

JEFFREY W. APPEL (3630)
JAMES L. WARLAUMONT (3386)
BENJAMIN T. WILSON (5823)
COLLARD, APPEL & WARLAUMONT, L.C.
1100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-1252

Attorneys for Castle Valley
Special Service District

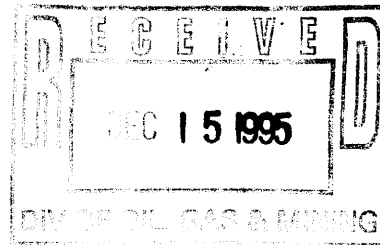
J. CRAIG SMITH (4143)
DAVID B. HARTVIGSEN (5390)
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for North Emery Water Users Association
and Huntington-Cleveland Irrigation Company

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IN THE UTAH SUPREME COURT

CASTLE VALLEY SPECIAL
SERVICE DISTRICT, NORTH
EMERY WATER USERS
ASSOCIATION, and HUNTINGTON-
CLEVELAND IRRIGATION COMPANY,

Petitioners,

vs.

UTAH BOARD OF OIL, GAS AND
MINING,

Respondent..

JOINT DOCKETING STATEMENT

Case Number: 950487

Cause Number: ACT/015/025-93B

Docket Number: 94-027

Castle Valley Special Service District, North Emery Water Users Association and Huntington-Cleveland Irrigation Company, (collectively "Petitioners"), by and through counsel, hereby submit this Docketing Statement pursuant to Rule 9 of the Utah Rules of Appellate Procedure.

1. DATE OF ENTRY OF ORDER SOUGHT TO BE REVIEWED:

This is an appeal from the order of the Board of Oil, Gas and Mining issued in this matter on June 13, 1995 (Attachment "A"), and from the order of the Board of Oil, Gas and Mining issued in this matter on October 12, 1995 (Attachment "C"), denying Petitioners' request to rehear or modify its order issued June 13, 1995.

2. NATURE OF POST ORDER MOTION(S) AND DATE(S) FILED:

On July, 10, 1995, Petitioners filed a "Request for Re-hearing and Modification of Order dated June 13, 1995, by the Utah Board of Oil, Gas and Mining." (Attachment "B").

3. DATE AND EFFECT OF ORDER(S) DISPOSING OF POST ORDER MOTION(S):

On October 12, 1995, the Utah Board of Oil, Gas and Mining denied Petitioner's request to rehear or modify its order issued June 13, 1995. (Attachment "C").

4. DATE OF FILING OF PETITION FOR WRIT OF REVIEW:

Petitioners filed their Petition for Writ of Review on November 9, 1995. (Attachment "D").

5. JURISDICTION:

The Utah Supreme Court has jurisdiction in this matter pursuant to Sections 78-2-2(3)(e)(iv) and 40-10-30(3), Utah Code Ann. 1953, as amended.

6. NAME OF THE AGENCY:

This proceeding arises out of a final order from formal adjudicative proceedings conducted by the Utah Board of Oil, Gas and Mining.

7. STATEMENT OF FACTS:

Petitioners are a special service district, a water users association and an irrigation company. Each owns and uses water from either Birch Spring, Big Bear Spring, or both, in Emery County, Utah. The springs are located adjacent to the operations of Co-Op Mining Company's ("Co-Op's") Bear Canyon Mine. These springs are a primary culinary water source for many of the residents of Emery County.

In 1993 Petitioners received notice from the Division of Oil, Gas and Mining that Co-Op had filed an application to extend mining into the "Tank Seam" in the Bear Canyon Mine. This seam is in a stratigraphic layer located above the area currently mined by Co-Op, known as the Blind Canyon Seam. On August 12, 1993, Petitioners timely filed their objections (Attachment "E") to the application because mining in the Tank Seam would damage the springs. Informal adjudicative proceedings took place, and the Division of Oil, Gas and Mining, approved a significant revision to Co-Op's mining permit on July 21, 1994. (Attachment "A," ¶ 5).

On August 22, 1994, Petitioners timely filed a Request for Agency Action with Respondent Board of Oil, Gas and Mining. Petitioners appealed the Division's decision to approve Co-Op's significant revision to extend its mining operations into the Tank Seam. (Attachment "F"). Petitioners requested that Co-Op provide replacement water to mitigate the adverse affects of its mining activities near the springs and take measures to protect the

springs from contamination.

On October 6, 1994, the Board issued a Notice of Hearing (Attachment "G") advising interested persons that,

The purpose of the proceeding will be for the Board to consider the objection of the petitioner to the Division determination approving Co-Op Mining Company's Significant Revision to extend its mining operations into the Tank Seam.

(Transcript 10/25/94 at pp. 29-30, lines 24-4).

The Board held formal hearings on October 25, 1994, and November 17, 1994. Prior to the hearings, Co-Op moved (basing its motion on the doctrine of collateral estoppel) to exclude any evidence of adverse impacts to Birch and Big Bear Springs previously presented by Petitioners during the renewal of Co-Op's permit in 1991. (Transcript 10/25/94 at p. 5, lines 11-12; p. 6-7, lines 22-6). Also at the commencement of the hearings, counsel for Co-Op moved to exclude evidence on the ground that any evidence not related solely to the Tank Seam would be irrelevant. (Transcript 10/25/94 at p. 14, lines 9-13; p. 18, lines 8-23). In deciding these motions, the Board ruled that Co-Op's collateral estoppel motion was untimely made, nevertheless it "would only consider evidence as it relates to the impact of mining of the Tank Seam." (Transcript 10/25/94 at p. 29, lines 14-16).

While Petitioners believed that the Tank Seam issue must be considered within the context of the operations of Co-Op in the area, Petitioners and other participants proceeded on the basis that the scope of the hearings was limited to replacement water and

permit conditions for the proposed Tank Seam revision and the impacts of the proposed revision.¹ In an Order, dated June 13, 1995, (Attachment "A"), the Board concluded that mining in the Tank Seam should be permitted.

The Board, however, made findings of fact and conclusions of law regarding the hydrologic effects of mining in the Blind Canyon Seam, which were excluded by Order of the Board. (Attachment "A," ¶¶ 40-42). Since the Board's findings and the subsequent conclusions of law regarding the Blind Canyon Seam were unfounded and addressed matters beyond the acknowledged and advertised scope of the hearing and, thus, not at issue, the Petitioners filed a "Request for Re-hearing and Modification of Order," and Co-Op filed a memorandum in opposition arguing that the Board's findings were "subsidiary findings" citing *Milne Truck Lines, Inc. v. Public Service Commission*, 720 P.2d 1373, 1378 (Utah 1986). The request for re-hearing and modification was denied, and Petitioners brought this appeal.

8. ISSUES FOR REVIEW AND STANDARDS OF REVIEW:

- A. WHETHER THE BOARD OF OIL, GAS & MINING WAS WITHOUT JURISDICTION TO MAKE FACTUAL FINDINGS AND CONCLUSIONS OF LAW ON ISSUES IT HAS DETERMINED ARE OUTSIDE ITS JURISDICTION AND WHICH WERE NOT PROPERLY NOTICED.

Standard of Review: The Board of Oil, Gas & Mining's action in an adjudicative proceeding must be set aside if it is excess of

¹ The Petitioners argued for a broader scope of review by the Board. However, the Board rejected those arguments and determined that it would only consider the issue of the impact on hydrology and water sources caused by mining of the Tank Seam.

statutory jurisdiction, authority or limitations. When reviewing the Board's interpretation or application of general questions of law, the Court applies a correction-of-error standard and gives the Board's view on the matter no particular deference.

Supporting Authority: Utah Code Ann. § 40-10-30 (3)(c), Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (1991).

B. WHETHER THE BOARD OF OIL, GAS AND MINING LACKED JURISDICTION TO CONSIDER THE HYDROLOGIC EFFECTS OF MINING IN THE BLIND CANYON SEAM.

Standard of Review: The Board of Oil, Gas and Mining's action must be set aside if it is in excess of statutory jurisdiction, authority, or limitations. When reviewing the Board's interpretation or application of general questions of law, the Court applies a correction-of-error standard and gives the Board's view on the matter no particular deference.

Supporting Authority: Utah Code Ann. § 40-10-30(3)(c), Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (1991).

C. WHETHER IT WAS ERROR FOR THE BOARD OF OIL, GAS AND MINING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE HYDROLOGIC EFFECTS OF MINING IN THE BLIND CANYON SEAM WHEN THAT ISSUE WAS OUTSIDE THE SCOPE OF THE PROCEEDINGS AND PROPER NOTICE DID NOT EXIST.

Standard of Review: The Board of Oil, Gas and Mining's action must be set aside if it is unreasonable, unjust, arbitrary, capricious, or an abuse of discretion. When reviewing the Board's interpretation or application of general questions of law, the Court applies a correction-of-error standard and gives the Board's view on the matter no particular deference.

Supporting Authority: Utah Code Ann. § 40-10-30(3)(a),
Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (1991).

- D. WHETHER IT WAS ERROR FOR THE BOARD OF OIL, GAS AND MINING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE HYDROLOGIC EFFECTS OF MINING IN THE BLIND CANYON SEAM WHEN IT HAD RULED THAT IT WOULD ONLY CONSIDER EVIDENCE RELATED TO THE IMPACT OF MINING OF THE TANK SEAM.

Standard of Review: The Board of Oil, Gas and Mining's action must be set aside if it is unreasonable, unjust, arbitrary, capricious, or an abuse of discretion. When reviewing the Board's interpretation or application of general questions of law, the Court applies a correction-of-error standard and gives the Board's view on the matter no particular deference.

Supporting Authority: Utah Code Ann. § 40-10-30(3)(a),
Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (1991).

- E. WHETHER IT WAS A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS FOR THE BOARD OF OIL, GAS AND MINING TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUES OUTSIDE THE SCOPE OF REVIEW ESTABLISHED BY THE PROCEEDINGS.

Standard of Review: The Board of Oil, Gas and Mining's action must be set aside if it is contrary to constitutional right, power, privilege, immunity or not in compliance with procedure required by law. When reviewing the Board's interpretation or application of general questions of law, the Court applies a correction-of-error standard and gives the Board's view on the matter no particular deference.

Supporting Authority: Utah Code Ann. § 40-10-30(3)(b) & (d),
Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (1991).

- F. WHETHER THE BOARD OF OIL, GAS AND MINING'S FINDINGS

REGARDING THE EFFECTS OF CO-OP'S MINING IN THE BLIND CANYON SEAM ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE BOARD RULED THAT EVIDENCE NOT RELATED TO THE TANK SEAM WAS IRRELEVANT.

Standard of Review: The Board of Oil, Gas and Mining's decision in an adjudicative proceeding should be set aside if it is found to be unsupported by substantial evidence on the record.

Supporting Authority: Utah Code Ann. § 40-10-30(3)(a) & (f), Utah Rule of Evidence 402, Tolman v. Salt Lake County Attorney, 8 P.2d 23 (Utah App. 1991).

- G. WHETHER THE BOARD OF OIL, GAS & MINING ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE BOARD HAS NO JURISDICTION TO ENFORCE 30 USC § 1309a, AND THAT REVIEW OF A MINING PERMIT IS NOT THE PROPER FORUM TO RAISE WATER REPLACEMENT CLAIMS.

Standard of Review: The Board of Oil, Gas & Mining's action must be set aside if it is unreasonable, unjust, arbitrary, capricious, or an abuse of discretion. When reviewing the Board's interpretation or application of general questions of law, the Court applies a correction-of-error standard and gives the Board's view on the matter no particular deference.

Supporting Authority: Utah Code Ann. § 40-10-30(3)(a), Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (1991).

9. DETERMINATION OF CASE BY SUPREME COURT:

This Appeal presents an important issue of administrative law, i.e., whether an administrative body may make factual findings and legal conclusions outside the scope of its published notice and its jurisdiction as determined by the administrative body. This is precisely what has occurred. The Board of Oil, Gas & Mining determined not only that its jurisdiction was limited solely to the

hydrologic impact of mining of the Tank Seam, it then went on to find facts and make conclusions of law regarding the mining of the Blind Canyon Seam. (Attachment B, Paragraphs 42-53, Findings of Fact, and Paragraphs 6-9, Conclusions of Law.)

The Court of Appeals has already ruled that an administrative body may not adjudicate claims outside its jurisdiction. Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992). The Court of Appeals has also held that administrative agencies must have subject matter jurisdiction to decide a controversy. Blaine Hudson Printing v. Utah State Tax Commission, 870 P.2d 290 (Utah App. 1994). The issue of law undecided in Utah is whether an administrative body may adjudicate matters outside the scope of its published notice and its own rulings on its jurisdiction.

Petitioners presented the relevant Utah law to the Board of Oil, Gas & Mining on rehearing, pointing out that the Order of the Board was inconsistent in that it both disclaimed jurisdiction over mining activities outside the Tank Seam, but made factual findings and legal rulings on such matters over which it had disclaimed jurisdiction. Presented with this inconsistency, the Board refused to modify its Order. Thus, a ruling from this Court is necessary to clarify this facet of Utah Administrative law.

10. DETERMINATIVE LAW:

Tribunal is restricted to issues within its jurisdiction and properly before it, otherwise actions are arbitrary, capricious and not in accordance with procedure set by law.

Blaine Hudson Printing v. Tax Commission,
870 P.2d 291 (Utah App. 1994)
Parkdale Care Center v. Frandsen,
837 P.2d 989 (Utah App. 1992)
Tolman v. Salt Lake County Attorney,
818 P.2d 23 (Utah App. 1991)
Kennecott Corp. v. Industrial Commission,
740 P.2d 305 (Utah App. 1987)

Combe v. Warren's Family Drive-Inns, Inc.,

680 P.2d 733 (Utah 1984)

Utah Dept. of Admin. Services v. PSC, 658 P.2d 601 (Utah 1983)

State ex rel. Dep't of Community Affairs v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980)

Utah State Board of Regents v. Utah Public Service Commission, 583 P.2d 609 (Utah 1978)

Agency findings must be supported by substantial relevant evidence

U.S. West Communications, Inc. v. Public Service Commission,

882 P.2d 141 (Utah 1994);

Hidden Valley Coal Co. v. Utah Board of Oil, Gas & Mining,

866 P.2d 564 (Utah App. 1993)

LaSal Oil Co. v. Department of Environmental Quality,

843 P.2d 1045 (Utah App. 1992);

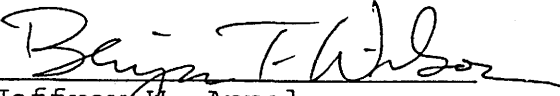
Adams v. Board of Rev. of Indus. Commission,


821 P.2d 1 (Utah App. 1991)

DATED this 14th day of December, 1995.

COLLARD, APPEL & WARLAUMONT

NIELSEN & SENIOR


Jeffrey W. Appel
Benjamin T. Wilson
Attorneys for Castle Valley
Special Service District


J. Craig Smith
David B. Hartvigsen
Attorneys for North Emery
Water Users Association
and Huntington-Cleveland
Irrigation Company

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 1995, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Joint Docketing Statement to the following:

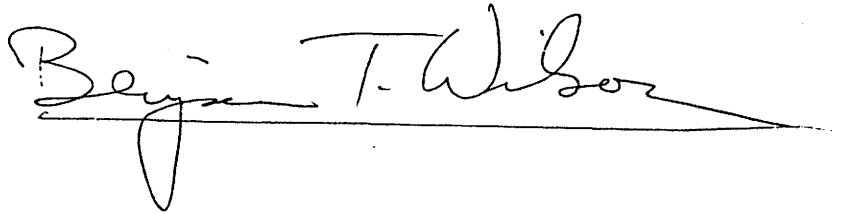
Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

F. Mark Hansen, Esq.
341 South Main, Suite 406
Salt Lake City, Utah 84111

Jan Graham, Esq.
Utah Attorney General
236 State Street
Salt Lake City, Utah 84114

Thomas A. Mitchell, Esq.
Assistant Attorney General
3 Triad Center, #350
Salt Lake City, Utah 84180

Utah Board of Oil, Gas and Mining
3 Triad Center, #350
Salt Lake City, Utah 84180



ATTACHMENT "A"

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE REQUEST	:	
FOR AGENCY ACTION AND APPEAL	:	
OF DIVISION DETERMINATION TO	:	ORDER
APPROVE SIGNIFICANT REVISION	:	
TO PERMIT TO ALLOW MINING OF	:	
TANK SEAM BY CO-OP MINING	:	
COMPANY BY PETITIONERS NORTH	:	DOCKET NO. 94-027
EMERY WATER USERS ASSOCIATION,	:	
HUNTINGTON-CLEVELAND	:	CAUSE NO. ACT/015/025
IRRIGATION COMPANY, AND CASTLE	:	
VALLEY SPECIAL SERVICES	:	
DISTRICT, CARBON COUNTY, UTAH	:	

---oo0oo---

Pursuant to the Appeal of the Division Determination to Approve the Significant Revision of Permit to Allow Mining of the Tank Seam by Co-Op Mining Company By Petitioners North Emery Water Users Association, Huntington-Cleveland Irrigation Company, and Castle Valley Special Services District, this cause came on for hearing before the Board of Oil, Gas & Mining (the "Board"), Department of Natural Resources, State of Utah, on Tuesday, October 25, 1994 and Thursday, November 17, 1994 in the Boardroom of the Division of Oil, Gas & Mining (the "Division"), 3 Triad Center, Suite 520, 355 West North Temple, Salt Lake City, Utah.

The following Board members were present and participated in the hearing and the Board's decision herein:

David D. Lauriski, Chairman
Jay L. Christensen
Judy F. Lever
Thomas B. Faddies
Raymond Murray
Kent G. Stringham

Board Member Elise Erler participated in the hearing, but did not participate in the Board's decision in this matter.

The Board was represented by John W. Andrews, Esq. and the Division was represented by Thomas A. Mitchell, Esq., both Assistant Attorneys General for the State of Utah.

Petitioners North Emery Water Users Association and Huntington-Cleveland Irrigation Company were represented by J. Craig Smith, Esq., of the law firm of Nielsen & Senior, Salt Lake City. Petitioner Castle Valley Special Service District was represented by Jeffrey W. Appel, Esq., of the law firm of Appel and Mattson, Salt Lake City. Respondent Co-Op Mining Company was represented by Carl E. Kingston, Esq., and F. Mark Hansen, Esq., both of Salt Lake City.

NOW THEREFORE, the Board, having considered the pleadings filed by the parties, the testimony of the witnesses, and the exhibits presented at said hearing, and being fully advised in the premises, now enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

A. Introduction.

1. The petitioners in this proceeding are appealing the determination of the Division of Oil, Gas & Mining (the "Division") to grant Co-Op Mining Company ("Co-Op") a significant revision to its mining permit under the Utah Coal Mining and Reclamation Act, Utah Code Ann. § 40-10-1 et seq.

2. The significant revision to Co-Op's mining permit would allow Co-Op to mine a coal seam known as the Tank Seam within Co-Op's existing Bear Canyon Mine in Emery County, Utah. The Tank Seam is located approximately two hundred vertical feet above Co-Op's existing coal mining operations, which are currently being conducted in the Blind Canyon coal seam in the Bear Canyon mine.

3. Petitioners North Emery Water Users Association, Huntington-Cleveland Irrigation Company and Castle Valley Special Services District (collectively the "Water Users") are engaged in the collection and distribution of culinary and irrigation water to users in the general vicinity of the Bear Canyon mine.

4. The Water Users generally contend that Co-Op's existing and proposed mining operations have negatively affected the quantity and quality of water flow from two springs, Birch Springs and Big Bear Springs. Birch Spring is managed by and provides water for the water systems of petitioners Huntington-Cleveland Irrigation Company and North Emery Water Users.

Hearing Transcript (hereinafter cited as "T. __.") at 40. Big Bear Spring is managed by and provides water for the water system of petitioner Castle Valley Special Service District. T. 74-76.

5. The Division approved Co-Op's Application for a Significant Revision to permit mining in the Tank Seam by a decision and accompanying Technical Analysis dated July 21, 1994.

6. The Water Users timely appealed the Division decision on August 22, 1994, and requested that the Board of Oil, Gas &

Mining (the "Board") either reverse the Division's approval or, in the alternative, require Co-Op to provide replacement water supplies to the Water Users at Co-Op's sole expense.

7. The Board conducted an extensive formal evidentiary hearing in this matter on October 25, 1994 and November 17, 1994, and additionally considered post-hearing memoranda filed by the parties.

8. At the evidentiary hearing, the Water Users presented testimony by certain of its employees and officers concerning the history and development of Birch and Big Bear Springs, and historic flow rates of the springs. The Water Users also presented expert testimony by Mr. Bryce Montgomery, a consulting geologist, about the alleged impacts of Co-Op's mining activities on the quantity and quality of flows from the springs, and the geologic mechanisms by which such impacts might occur.

9. Co-Op presented evidence in rebuttal by its expert consultants that all water encountered within the Bear Canyon mine was for a variety of reasons hydrologically separate from Big Bear and Birch Springs. Co-Op's experts also testified that the Tank Seam, the area which it sought to mine pursuant to its application for a Significant Permit Revision, was essentially dry and not in any way linked to the disputed aquifer(s).

10. The Division also presented testimony by Division hydrologist Tom Munson and Division permit supervisor Darron Haddock concerning Co-Op's application and associated hydrologic studies.

B. Area Geologic Description.

11. The Bear Canyon Mine is located near the eastern margin of the Wasatch Plateau Coal Field in Bear Creek Canyon, a tributary to Huntington Canyon, in Emery County, Utah. Exhibit D, p. 1-2. In the Bear Canyon mine, coal is currently removed from two generally horizontal seams within the Blackhawk Formation, the Blind Canyon Seam and the Hiawatha Seam. Id. at p. 2-4. Co-Op began operations at the mine in 1981. T. 168.

12. The Tank Seam, which Co-Op seeks to mine pursuant to the disputed application for Significant Permit Revision, is also located within the Blackhawk formation, 220 to 250 vertical feet above the Blind Canyon seam. Id. at p. 2-6.

13. In the vicinity of the Bear Canyon mine, the stratigraphic sequence from the surface downward includes the North Horn Formation, the Price River Formation, the Castlegate Sandstone, the Blackhawk Formation, the Star Point Sandstone, and the Mancos Shale. Exhibit C, Table 2-4.

14. In the vicinity of the mine, groundwater is contained within the Star Point sandstone. The Star Point sandstone is composed of three separate members: the upper member is the Spring Canyon member, the middle member is the Storrs member; and the lower member is the Panther member. T. 105-106.

15. Birch Springs is located on the east side of Highway 31 in Huntington Canyon between Bear Canyon and Trail Canyon. Exhibit 1 ; T. 39. Big Bear Spring is located on the north side of Bear Canyon approximately one half mile from Co-Op's mine

portal into the Blind Canyon seam. T. 77-78. Neither spring is located within the permit area. Exhibit C, p. 2-9.

16. The two springs both issue from the Panther member of the Star Point sandstone where it contacts the Mancos shale. The Mancos shale is impervious to water and acts as a floor to hold the groundwater above it in overlying formations. T. 105.

C. Disputed Hydrologic Issues.

17. Petitioners called as an expert witness Mr. S. Bryce Montgomery, a consulting professional geologist, with experience in groundwater hydrology. T. 99-100.

18. Mr. Montgomery's basic theory of the hydrology of the area was based upon the concept of a regional aquifer. The base of this aquifer is the level at which the Panther member of the Star Point sandstone contacts the impermeable Mancos shale. It is at this level that Birch and Big Bear Springs issue forth. T. 106. Mr. Montgomery testified that the aquifer has a potentiometric surface (the level below which the aquifer is fully saturated) that slopes upward to the north toward Gentry Mountain. T. 106. As the potentiometric surface slopes upward to the north, Mr. Montgomery posited that it reached up into the Blackhawk formation which contains the coal beds, and where it is intercepted by coal mining. T. 106.

19. Mr. Montgomery testified that groundwater in this aquifer flows not only laterally through the pervious sandstone beds, but also vertically downward through the strata by means of extensive faulting in the area. T. 106-107. Birch and Big Bear

Springs, along with the Co-Op mine, are located between two large faults known as the Pleasant Valley Fault and the Bear Canyon fault. T. 107; Exhibit 8.

20. Mr. Montgomery's conclusion about the effects of Co-Op's mining was that the north portion of Co-Op's mining in the Blind Canyon seam had intercepted the potentiometric surface of the regional aquifer. He testified that water that would normally flow in its natural course down through the bedding and the fracture system to discharge naturally from the subject springs was instead being intercepted by coal mining and conveyed out of the groundwater system. T. 122, 141. This would in turn reduce the amount of water in storage for the springs, and negatively affect their flow for many years. T. 122.

21. Mr. Montgomery also testified about what he considered to be anomalous flows from the subject springs caused by Co-Op's alleged dumping of surplus water in the south end of the mine, demonstrating a linkage between the mine workings and the springs. T. 147-148. Mr. Montgomery testified that this water carried or picked up calcium sulfate, resulting in the anomalous levels of calcium and sulfates shown for 1991 by Exhibit 18. T. 148.

22. Co-Op called as expert witnesses Mr. John D. Garr and Mr. Richard B. White, respectively a consulting geologist and a consulting hydrologist with Earthfax Engineering ("Earthfax"). Earthfax was hired by Co-Op to revise the hydrologic characterization of the Bear Canyon mine and the Statement of

Probable Hydrologic Consequences ("PHC") for the mine. T. 200.

23. Earthfax's activities included the drilling of four in-mine monitoring wells downward from the Blind Canyon seam to the Mancos shale, with hydrologic testing of each of the three members of the Star Point sandstone. T. 201.

24. Mr. Garr disputed Mr. Montgomery's testimony concerning the existence of a regional aquifer, testifying that more site-specific data led him to reach a different conclusion. T. 202.

25. Mr. Garr testified that there are three separate aquifers below the mine, each with a separate piezometric surface and each separated and confined by shale interbedding within the Star Point sandstone. T. 208-209. He concluded that the confinement of the aquifers, particularly in the northernmost drill hole, suggested that the recharge for the aquifers supplying the springs is miles to the north at a higher elevation, rather than in the Co-Op area. T. 209, 211, 261, 288-289.

26. Mr. White testified that the recharge area was far to the north of the mine in a "shatter zone" of fractured strata where water there would percolate easily downward into the Star Point sandstone. T. 312. The significance of this zone was that the recharge area for Big Bear and Birch springs in the Star Point sandstone would be lower than the mine, and not subject to being affected by it. T. 312-313, 322-326, 339-340.

27. Both Mr. Garr and Mr. White concluded that any water being intercepted by mining in the Blind Canyon seam is a

confined aquifer within the uppermost Spring Canyon member of the Star Point sandstone, which due to the confinement of the aquifers is separate from the source of the springs. Exhibit C, p. 2-33; T. 251, 255-256, 284, 288-289. They testified that because the Panther member, which is the source of water to both Birch and Big Bear springs, is hydrologically disconnected from the Spring Canyon member, any aquifer in that member encountered while mining would not affect spring flow. T. 358-359, 362.

28. Both Mr. Garr and Mr. White testified that water being encountered in the Blind Canyon seam generally represented perched aquifers, rather than the interception of the regional aquifer posited by Mr. Montgomery. T. 223, 285. Relying on a United States Geologic Survey report concerning mine dewatering in the area, Mr. Garr testified that the rate of natural downward flow into the regional aquifer is unlikely to be affected by the interception of perched aquifers. T. 223.

29. Mr. Garr and Mr. White testified that the location of the Blind Canyon fault was highly significant to the issue of whether Co-Op's mining in the Blind Canyon seam is affecting the flow of Birch Springs. Birch Springs is actually 800 feet to the west of the Blind Canyon fault, so the fault lies between the mine and the springs. T. 118, 212, 293-294. Mr. Garr testified that if groundwater were moving from the mine into the fault (which lies between the mine and Birch Springs) the water would either be stopped by the fault or the fault would act as a conduit for the water to emerge at the surface. T. 213, 266.

Because no spring exists where the Blind Canyon fault intersects the surface, Mr. Garr concluded that there was no connection between groundwater encountered in the mine and Birch Springs.

T. 213. 266-267.

D. Hydrologic Effect of Mining In The Tank Seam.

30. There was substantial legal dispute between Co-Op and the Water Users concerning the scope of the Board's review of the probable hydrologic consequences of mining. Co-Op argued that the only factual issue that the Board should consider was whether mining in the Tank Seam would cause material damage to the hydrologic balance. The Water Users argued that the Significant Permit Revision would allow the Bear Canyon mine to remain in operation, and would allow mine dewatering to continue. They contended the Board is therefore required to consider the possible hydrologic impact of all mining in the Bear Canyon mine at this time, rather than the impact only of mining the Tank Seam.

31. As more fully set forth in the succeeding paragraphs, the Board finds that, based upon the evidence, Co-Op's proposed mining in the Tank Seam will not cause material damage to the hydrologic balance.

32. The Water User's expert Mr. Montgomery admitted that no appreciable groundwater exists in the Tank Seam, and that the potentiometric surface of the principal aquifer was below the Tank Seam. T. 112, 123-125, 162. This testimony was corroborated by Co-Op's witness Mr. Garr, who testified that any

aquifer was well below the Tank Seam. T. 265.

33. Mr. Montgomery incorrectly assumed that there would be an internal ramping system within the mine between the Tank Seam and the area of the Blind Canyon seam presently being mined.

T. 113, 162. This assumption led Mr. Montgomery to conclude that the interval between the Tank Seam and the Blind Canyon Seam would be affected. T. 113. Mr. Montgomery also posited that contaminants deposited within the mine workings in the Tank Seam, and outside from road salt, would be conveyed downward to the base of the hydrologic system over time.

34. In fact, Co-Op will transport coal from the Tank Seam by means of a separate portal, and then into a vertical shaft back into the Blind Canyon seam to Co-Op's existing conveyor system. T. 174-176. This shaft intersects the south area of Co-Op's mine workings, in an area that is entirely dry. T. 175. The area underlying the access road is also dry. T. 175. This shaft encounters no water seepage anywhere in the hole between the Tank Seam and the Blind Canyon seam. T. 274.

35. Mr. Montgomery also testified that the removal of coal from the Tank Seam would eventually cause the collapse of overlying beds, increasing jointing and fracturing and furthering the conveyance of water and potential contaminants downward. T. 113.

36. Mr. Montgomery additionally testified that, although the Tank Seam was above the regional aquifer, it might encounter small perched aquifers, and interrupt the flow downward of water

contained in those aquifers through fractures, thereby reducing supply to the regional aquifer. T. 124-130, 162-163.

37. The Board notes the inconsistency between Mr. Montgomery's testimony that mining would eventually cause additional fracturing, thus increasing downward flows, with his testimony that mining would limit downward flows.

38. Co-Op's witnesses presented evidence rebutting Mr. Montgomery's testimony that mining within the Tank Seam could have negative hydrologic effects. In order to test whether water existed within the Tank Seam, Co-Op conducted a testing program involving the drilling of eight holes upward from the Blind Canyon seam into the Tank Seam at various locations. T. 171, 179. All but one of these drill holes was essentially dry, although one hole encountered flows of approximately a half gallon per minute. T. 172, 283. Similarly, the eight foot diameter bore hole between the two levels was also dry. T. 283.

39. Because there is little water in the Tank Seam, there is little possibility that any contaminants could be carried downward from the Tank Seam into the aquifers supplying the Water Users' springs. T. 285-287, 344. There is no significant recharge to the aquifers coming from the ridge above the mine because it is very narrow and has little flat surface to catch runoff. T. 211, 220-222.

40. In summary, the evidence establishes that:

(a) the Tank Seam is essentially dry;

- (b) the Tank Seam is well above the "regional aquifer" theorized by the Water Users;
- (c) no direct connection between any water that might in the future be located in the Tank Seam and the ostensible regional aquifer has been established;
- (d) the surface above the seam has limited recharge potential, further reducing the risk of contaminants being conducted downward.

41. Based upon this evidence, the Board finds that mining in the Tank Seam will not cause material damage to the hydrologic balance, either through reduction in supply or contamination. Co-Op has satisfied its burden of proof on this issue.

E. Hydrologic Effect of Mining In the Blind Canyon Seam.

42. Because the parties devoted a substantial portion of their evidence to the hydrologic effects of mining in the Blind Canyon seam, the Board feels obligated to make findings of fact concerning this issue.

43. The Board is faced with two differing expert models of the effect of mining in the Blind Canyon seam on aquifer(s). The Water Users' expert, Mr. Montgomery, testified to the existence of a regional aquifer with a potentiometric surface sloping from north to south, with Big Bear and Birch Springs exiting from the aquifer at the contact of the Star Point Sandstone. Mr. Montgomery theorized that the northern portions of Co-Op's mine workings had intersected the potentiometric surface, and that the removal of substantial quantities of this water through

mine dewatering had reduced current and future supplies to the Water Users' springs.

44. Co-Op's experts Messrs. Garr and White instead theorized separate aquifers in the Star Point sandstone rather than a single regional aquifer. They relied upon drilling in the mine that had established the existence of shale tongues interlineated between the three members of the Star Point sandstone. They testified that these shale tongues were generally impervious, and created essentially separate aquifers with separate potentiometric surfaces in each of the three sandstone members. Because the two disputed springs were supplied only from the lowest member, the Panther, any intersection between mining and the potentiometric surface of the separate aquifer in the upper Spring Canyon member would not affect spring flow.

45. While the Board recognizes that the evidence before it on this issue is not as clear as that concerning mining in the Tank Seam, it is ultimately convinced that Co-Op's hydrologic model is more convincing. As more fully set forth below, the Board believes that Co-Op's model is linked more closely to local conditions, and is supported by radiologic and chemical analyses establishing dissimilarities between mine waters and waters emanating from the two springs.

46. In preparing the PHC, Earthfax conducted tritium testing of waters encountered in the mine and flows from the two springs. Tritium is an isotope of hydrogen that was released

into the earth's atmosphere during open-air nuclear testing in the 1950s and 1960s. Tritium testing can be used to determine the "age" of water, because water that has been underground since before the nuclear era will have only small amounts of tritium, while new water exposed to fallout will have higher levels.

T. 287-288.

47. Tritium testing of water encountered in the mine showed that it was "old" water with low concentrations of tritium, while water from Big Bear Spring had tritium concentrations approximately ten times greater. T. 247, T. 288. This data indicates that Big Bear spring has a source different from the water encountered by Co-Op in the Blind Canyon seam. T. 288. While Mr. Montgomery speculated that higher tritium levels in Big Bear Spring could be caused by water seeping across surface formations prior to being tested, the Board does not find this testimony convincing.

48. Tritium testing did not rule out similarity between the mine water and waters tested from Birch Spring, as both waters were found to be "old" water. T. 247-248. However, chemical analysis of the mine water and water from the Birch Springs showed chemical dissimilarities between the two waters, particularly in the area of sulfate content. T. 290, 299-300, 304-306; Exhibit C, p. 2-19. The Water Users countered that higher levels of sulfates could be the result of spring water being affected by surface mineralization.

49. The Board also concludes that the evidence linking

declines in flows at the two springs to activities in the mine rather than the extensive drought Utah has suffered in recent years was unconvincing. For example, the Board notes that the Water Users' witness Darrell Leamaster, a civil engineer and District Manager of petitioner Castle Valley, acknowledged that high flows of up to 230-240 gallons per minute from Big Bear Spring in the 1983-1984 time period were linked to wet weather at the time. T.79, 97. Similarly, Exhibit 15, relied upon by the Water Users, appears to show a response in flow from Big Bear spring to high precipitation in the early 1980s. For Birch Springs, actual flow data was limited to several years. See Exhibit 16; T. 338. Testimony about higher flows when the spring was reworked may lack relevance, since the testimony concerned the high water years of 1983-84. T. 58.

50. Testimony by the Water Users' witnesses also focused on anomalous flows in Big Bear Spring in 1991, coupled with spikes in sulfates and calcium concentrations. Exhibit 18; T. 147-148. Co-Op's witness Mr. White disputed any causal connection between activities in the mine and these flows. T. 327. The Board does not believe that either side's evidence on this issue is dispositive.

51. The Water Users attempted, over objection by Co-Op, to present Little Bear Springs as a "control." Little Bear Springs is located across Huntington Canyon from the two subject springs and the Bear Canyon Mine, and so could not be affected by mining activity. The Water Users argued that, although part of the same

regional aquifer, it did not show the same decline in flow as Big Bear and Birch Springs, and so was probative of whether flows from the latter two springs had been affected by mining. The Board is convinced by Co-Op's expert testimony that the regional aquifer system in the mine area is complex, and that the hydrology of springs in the area is sufficiently different that they are generally not analogous. T. 208, 215-216. The Board also notes that even the U.S.G.S. report relied upon by Mr. Montgomery cautions against comparisons between springs in the area due to differing geology. T. 216. Accordingly, the Board finds that Little Bear Spring is not useful as a control in this matter.

52. In summary, the evidence establishes that:

- (a) Tritium analysis establishes that Big Bear spring and water encountered by Co-Op during mining are not of the same age, and thus hydrologically distinct;
- (b) chemical analysis supports, although it alone does not conclusively establish, the conclusion that Birch spring and the mine water are hydrologically distinct;
- (c) the existence of the Blind Canyon fault between the mine and Birch spring would preclude waters encountered in the mine from reaching Birch spring;

- (d) Co-Op's more-localized hydrologic model supports the conclusion waters encountered in the Bear Canyon mine from perched aquifers and/or the Spring Canyon member of the Star Point sandstone are hydrologically distinct from the springs, which issue from the Panther member of the Star Point sandstone.

53. The Board therefore finds that based upon the evidence before it, Co-Op's mining of the Blind Canyon seam is not likely to cause material damage to the hydrologic balance in the mine area, and is not linked to declines, if any, in spring flows from Big Bear and Birch Springs.

CONCLUSIONS OF LAW

1. Pursuant to Utah Code Ann. § 40-10-11(2), Co-Op has the burden of affirmatively demonstrating the following:

- (a) that the permit application is accurate and complete, and that all statutory and regulatory requirements have been complied with;
- (b) that reclamation can be completed as required by law and the proposed reclamation plan; and
- (c) that the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the Division, and the proposed operation of the same has been designed to prevent material damage to

the hydrologic balance outside the permit area.

2. The feasibility of reclamation and the adequacy of Co-Op's reclamation plan, a required showing under Utah Code Ann. § 40-10-11(2)(b), has not been challenged in this proceeding, and is not an issue here.

3. The Board concludes that the permit application was in fact complete, and that the requirements of the Utah Coal Mining and Reclamation Act and associated regulations have been complied with. The Water Users argue that the permit application is incomplete, and not in compliance with law, because the document incorporating the Division's determination of Probable Hydrologic Consequences allegedly does not include baseline data. Utah Code Ann. § 40-10-10(2)(c) requires a Division determination of the probable hydrologic consequences of mining operations. Such a determination was in fact made and approved by the Division. See Exhibit C. The Water Users contend that Co-Op's permit application does not comply with Division Rule R645-301-724, which requires baseline information concerning groundwater hydrology, because Table 2-5 of the PHC indicates that flow rates for the subject springs were not measured at the inception of mining. The Board is convinced that this omission is harmless. The Cumulative Hydrologic Impact Assessment (Exhibit D) for the proposed Significant Permit Revision contains the exact baseline information for the flow from these springs that the Water Users claim is absent. Exhibit D, p. 2-17, Appendix D. The absence of

this information from one table in the PHC when it is present in another portion of the permit application package is not significant. Utah Code Ann. § 40-10-11(2)(a) has been satisfied.

4. At the hearing in this matter, the parties disputed whether the possible effects of mining in the Blind Canyon seam should have been considered by the Division in ruling upon the Significant Permit Revision application. Co-Op's application for Significant Permit Revision involved only a proposal to mine the Tank Seam. Co-Op's current operations in the Blind Canyon seam are authorized under the terms of Co-Op's existing permit, which has not been challenged in this proceeding. The principal issue of law before the Board is whether possible negative hydrologic impacts of operations in the Blind Canyon seam should be considered here, or whether only impacts from mining in the Tank Seam may be considered.

5. If only the subject matter of the Significant Permit Revision application is to be considered, it is clear that Co-Op has met its burden of demonstrating that material damage to the hydrologic balance will not occur from mining in the Tank Seam. The great weight of the evidence showed that the Tank Seam was well above the regional aquifer theorized by the Water Users, that it was essentially dry, and that any effect that such mining would have by either limiting the downward flow of water or allowing contaminants into the hydrologic system was purely speculative.

6. One significant fact is that even if the Board were to

deny Co-Op's application for a Significant Permit Revision, mining could continue in the Blind Canyon seam under Co-Op's existing permit. The Board therefore does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area. Nonetheless, because the bulk of the evidence presented by the parties focused on cumulative impacts of all mining, the Board has made factual findings on this issue. The Board has found that the factual evidence does not support the conclusion that the continuation of Co-Op's previously authorized operations in the Bear Canyon mine will cause material damage to the hydrologic balance.

7. Co-Op presented a hydrologic model that appears to the Board to better describe local conditions than the model presented by the Water Users. Radiologic and chemical analysis appears to differentiate water found in the mine from water at Big Bear and Birch Springs. The Board simply has not heard convincing evidence that declines in flows at the two springs have resulted from mine dewatering instead of the drought conditions of recent years. The Board therefore concludes that the requirements of Utah Code Ann. § 40-10-11(2)(c) concerning material damage to the hydrologic balance have been satisfied.

8. At the hearing, the Board took under advisement Co-Op's motion to exclude evidence of damage to the Water Users' springs that took place prior to 1991, the date when Co-Op's mining permit for the Bear Canyon mine was last approved. Co-Op argued that the Water Users were collaterally estopped from raising

issues that had been raised and readjudicated before the Board and Division in the 1991 proceeding. The Board has chosen to consider all evidence before it concerning alleged damage to the Water Users' springs, and accordingly denies Co-Op's motion.

9. The water replacement requirements of 30 U.S.C. § 1309a are not applicable under the circumstances. That statute, which was enacted as part of the Federal Energy Policy Act of 1992, requires the operators of underground mines to replace promptly any water supplies adversely impacted by underground mining operations. The Water Users have failed to prove to the Board as a factual matter that either the quantity or quality of their water has been adversely impacted by mining at the Bear Canyon mine, so the statute may not be applied to Co-Op here.

10. In addition, the Board does not believe that a permit revision appeal such as this one is the proper forum for raising the federal statutory water replacement requirement. The Utah legislature has yet to incorporate the water replacement requirement for underground mines into the Utah Coal Mining and Reclamation Act. See Utah Code Ann. § 40-10-1 et seq. The Board questions whether it has jurisdiction under the Utah act to require water replacement pursuant to 30 U.S.C. § 1309a. This proceeding for review of a Division permit decision simply is not the proper forum for the Water Users' water replacement claims.

11. The Board finds that, under the circumstances set forth above, no attorneys fees, costs, or expenses should be awarded in this proceeding pursuant to Utah Code Ann. § 40-10-22(3)(e).

ORDER

IT IS THEREFORE ORDERED that Petitioners' appeal is denied, and the Division's action approving Co-Op's Application for a Significant Permit Revision is upheld. No costs, expenses or attorney's fees are awarded.

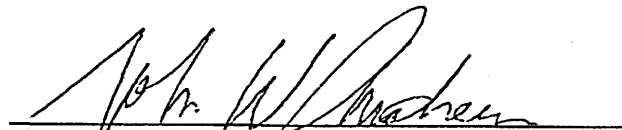
ISSUED & SIGNED this 13th day of June, 1995.

STATE OF UTAH
BOARD OF OIL, GAS & MINING



Dave D. Lauriski
Chairman

Approved as to Form:



John W. Andrews
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Board ORDER for Docket No. 94-027, Cause No. ACT/015/025 to be mailed by certified mail, postage prepaid, on the 14 day of June, 1995, to the following:

J. Craig Smith, Esq.
David B. Hartvigsen, Esq.
Nielsen & Senior
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Jeffrey W. Appel, Esq.
Michele Mattsson, Esq.
Collard; Appel & Warlaumont
1100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111


Wendell Owen
Co-Op Mining Company
P.O. Box 1245
Huntington, Utah 84528

Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

F. Mark Hansen, Esq.
341 South Main, Suite 406
Salt Lake City, Utah 84111

Hand Delivered to:

Thomas A. Mitchell, Esq.
Assistant Attorney General
Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center, Suite 475
Salt Lake City, Utah 84180



ATTACHMENT "B"

JEFFREY W. APPEL (3630)
BENJAMIN T. WILSON (5823)
COLLARD, APPEL & WARLAUMONT
1100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801)532-1252

Attorneys for Castle Valley
Special Service District

FILED

JUL 10 1995

SECRETARY, BOARD OF
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE REQUEST)	
FOR AGENCY ACTION AND APPEAL)	
OF DIVISION DETERMINATION)	REQUEST FOR RE-HEARING AND
TO APPROVE SIGNIFICANT)	MODIFICATION OF ORDER DATED
REVISION TO PERMIT TO ALLOW)	JUNE 13, 1995, BY UTAH BOARD
MINING OF TANK SEAM BY CO-OP)	OF OIL, GAS AND MINING
MINING COMPANY BY PETITIONERS)	
NORTH EMERY WATER USERS)	
ASSOCIATION, HUNTINGTON-)	
CLEVELAND IRRIGATION COMPANY,)	Docket No. 94-027
AND CASTLE VALLEY SPECIAL)	
SERVICE DISTRICT, CARBON)	Cause No. ACT/015/025-93B
COUNTY, UTAH.)	
)	

Petitioners, by and through their counsel of record, hereby jointly request a re-hearing and modification of the Order dated June 13, 1995, for the purposes and reasons set forth below.

INTRODUCTION AND FACTUAL BACKGROUND

The hearing by the Utah Board of Oil, Gas and Mining ("Board") on October 25, 1994, and November 17, 1994, was specifically limited to a review of the Division of Oil, Gas and Mining's ("DOGM") approval of significant revision to permit to allow the mining of the Tank Seam by Co-Op Mining Company (Request for Agency

Action ¶¶2 and 3) (see also R645-300-211 and R645-303-223). As articulated by counsel for Co-Op at pg. 1 of their document entitled Closing Argument dated December 17, 1994:

"Petitioners are only entitled to a hearing on the reason for DOGM's decision to approve the significant revision. Petitioners did not request a NOV or other agency action based on CWM's past mining activity. Petitioners did not request, are not entitled to, and did not receive a hearing on whether to approve or modify CUM's existing permit. [citation omitted] Under R645-300-211 and the relief Petitioners request in their Request for Agency Action, the only question is whether CUM satisfied the requirements for approving the significant revision to permit mining the Tank Seam."

The information submitted by Petitioners concerning the regional aquifer and the movement of water through the stratigraphy in the area of the Co-Op Mining operations was to place the proposed Tank Seam in a context with those operations and to avoid the segmented view of the operations Petitioners believed Co-Op and the DOGM had taken in prior proceedings.

Despite the jurisdictional limitations placed upon the proceeding under statute, rule, by counsel (Mitchell T13, T16 and T24; Appel T84, T162; Smith T331-4, T430-34; and Hansen--nearly continuously) and by consistent reminder by the Chairman throughout the proceedings (T29-30, T87-88, T150), the Board has reached beyond its jurisdictional parameters and included findings of fact and conclusions of law concerning the hydrologic effect of mining in the Blind Canyon seam. As articulated by the Board and all counsel throughout the proceeding and found by the Board in its Order, those were not the issues before the Board and such rulings

were unnecessary and far beyond the scope of the issue concerning the Tank Seam.

ARGUMENT

Only two issues were presented by Petitioners: 1) was the permit revision for the Tank Seam properly studied, processed and approved by the DOGM; and 2) if material damage to the hydrology was created by that mining or if it was to occur, what replacement water sources were available to mitigate the adverse impacts of the mining activity?

In the course of its Order, the Board has fully recognized and embraced the above-referenced scope of these proceedings. Yet, it has gone beyond its acknowledged jurisdictional scope and incorporated Findings of Fact and Conclusions of Law concerning the hydrologic effect of mining in the Blind Canyon seam (Findings 42 through 53 and Conclusions of Law 6 through 9). As the Board stated at Conclusion of Law No. 4, ¶20:

"Co-Op's application for Significant Permit Revision involved only a proposal to mine the Tank Seam. Co-Op's current operations in the Blind Canyon seam are authorized under the terms of Co-Op's existing permit, which has not been challenged in this proceeding. The principal issue of law before the Board is whether possible negative hydrologic impacts of operations in the Blind Canyon seam should be considered here, or whether only impacts from mining in the Tank Seam may be considered."

and at Conclusion No. 6, pg. 20-21:

"The Board therefore does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area."

At the hearings, Mr. Mitchell on behalf of the DOGM and the attorneys for Co-Op made countless repeated objections concerning the relevance of the hydrologic impacts of existing mining in the permit area and the Board took that issue under advisement. Obviously, that objection was sustained in the course of this Order.

It is important to note that in response to these repeated objections, counsel for Petitioners indicated that they were not attempting to adjudicate or re-adjudicate the permit for the currently mined area. Rather, the evidence was produced to provide a context within which to review the mining of a certain stratigraphic layer known as the Tank Seam. That was all the evidence was designed to illuminate. Had the existing mining area and its impacts been the issue before the Board, then the evidence produced by Petitioners would have been substantially different and far more complete. To make factual findings and legal rulings upon issues not before the Board based upon evidence put in for an entirely different purpose is beyond the scope of the jurisdiction of the Board and grossly unfair and prejudicial to Petitioners in future proceedings. The proper approach is to modify the Order to include only that information absolutely necessary to support the issue that is actually before the Board. In this case, only the findings and conclusions necessary to uphold the approval by DOGM for the Tank Seam.

It is a basic tenant of administrative law that jurisdiction of an administrative agency is limited by the grant of jurisdiction

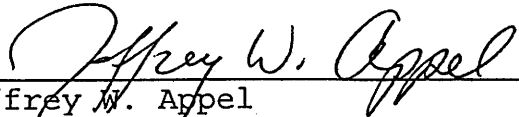
to the agency. See Blaine Hudson Printing v. Tax Commission, 870 P.2d 291 (Utah App. 1994). While procedural jurisdiction is generally granted to the Board to review division determinations by Utah Code Ann. §40-10-14(3). The scope of such review is limited to the subject matter presented by the division determination appealed. In Blaine Hudson Printing, the Utah Court of Appeals held that "[b]oth courts and quasi-judicial administrative agencies must have subject matter jurisdiction to validly decide a controversy." In the instant action there was no notice that the Board would make a decision concerning the hydrologic effect of mining in the existing permit area of the Blind Canyon seam. All counsel and the chairman of the Board agreed that the evidence had to tie to impacts of the Tank Seam and the evidence was presented in that fashion and for that purpose alone. That stipulation completely defined the parameters of the jurisdiction of the proceeding and, by definition, did not include an adjudication of the impact of mining on the Blind Canyon seam.

In the case of Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992), the Court held that while an administrative agency may have jurisdiction to adjudicate certain claims, it cannot adjudicate other claims over which it has no jurisdiction brought before it in the same proceeding. That principle is applicable here and requires the exclusion, at a minimum, of ¶¶ 42 through 53 from the Findings of Fact and ¶¶ 6 through 9 from the Conclusions of Law. In that the Board ruled it did not have jurisdiction to consider those impacts and they were not relevant

to the inquiry before it, such Findings and Conclusions may not appear in the Order. Their inclusion is inconsistent with the Board's jurisdictional rulings.

Petitioners respectfully request that the Board's Order be so modified. A hearing and right of reply is requested in this matter.

Respectfully submitted this 10th day of July, 1995.



Jeffrey W. Appel
Benjamin T. Wilson
Attorneys for Castle Valley Special
Service District
NIELSEN & SENIOR
J. Craig Smith
David B. Hartvigsen
Attorneys for North Emery Water Users
Association and Huntington-
Cleveland Irrigation Company

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 1995, I caused a true and correct copy of the foregoing Request for Re-hearing and Modification of Order Dated June 13, 1995, by Utah Board of Oil, Gas and Mining to be mailed, postage prepaid, to the following:

Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

F. Mark Hansen, Esq.
341 South Main, Suite 406
Salt Lake City, Utah 84111

Thomas A. Mitchell, Esq.
Assistant Attorney General
3 Triad Center, #350
Salt Lake City, Utah 84180

J. Craig Smith
NIELSEN & SENIOR
60 East South Temple, #1100
Salt Lake City, Utah 84111

Wendy S. Nott

ATTACHMENT "C"

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

---oo0oo---

IN THE MATTER OF THE REQUEST)
FOR AGENCY ACTION AND APPEAL)
OF DIVISION DETERMINATION TO)
APPROVE SIGNIFICANT REVISION)
TO PERMIT TO ALLOW MINING)
OF TANK SEAM BY CO-OP MINING)
COMPANY BY PETITIONERS)
NORTH EMERY WATER USERS)
ASSOCIATION,)
HUNTINGTON-CLEVELAND)
IRRIGATION COMPANY, AND)
CASTLE VALLEY SPECIAL)
SERVICES DISTRICT, CARBON)
COUNTY, UT)

ORDER DENYING REQUEST
TO RE-HEAR AND TO
MODIFY THE ORDER
DATED 6/13/95

Docket No. 94-027

Cause No. ACT/015/025-93B

---oo0oo---

A document in the above matter captioned "Request for Re-Hearing and Modification of Order Dated June 13, 1995 By Utah Board of Oil, Gas and Mining" (the "Joint Motion") was filed July 10, 1995 with the Secretary of the Board of Oil, Gas and Mining (the "Board"). The Joint Motion was filed jointly by the Castle Valley Special Service District (the "Service District"), the North Emery Water Users Association (the "Water Association"), and the Huntington-Cleveland Irrigation Company (the "Irrigation Company"). Separate memoranda in opposition to the Joint Motion were filed thereafter by the Division of Oil, Gas and Mining, Department of Natural Resources, State of Utah (the "Division") and by Co-op Mining Company (the "Mining Company"). Pursuant to notice, the Joint Motion came on for hearing at a regularly

scheduled meeting of the Board held on September 27, 1995 at 10:00 a.m. in the Board's hearing room at #3 Triad Center, 375 West North Temple, Salt Lake City, Utah. Attorney Jeffrey W. Appel appeared on behalf of the Service District. Attorney J. Craig Smith appeared on behalf of the Water Association and the Irrigation Company. Assistant Utah Attorney General Thomas A. Mitchell appeared on behalf of the Division. Attorney F. Mark Hansen appeared on behalf of the Mining Company. No other persons entered appearances. Assistant Utah Attorney General Patrick J. O'Hara acted as legal counsel to the Board.


After hearing all the arguments of the above counsel, and after reviewing the respective filings by the above parties, the Board hereby rules as follows:

1. The Board holds that it does have the power under Rules R641-110-100 to -500 of the Utah Administrative Code to consider and decide the Joint Motion, and that the Joint Motion was timely filed.

2. Based on a majority vote of the Board, the Board denies the Joint Motion.

ISSUED AND SIGNED this 12th day of October, 1995.

STATE OF UTAH, BOARD OF OIL,
GAS AND MINING

By 
David D. Lauriski
Chairperson

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing "Order Denying Request to Re-hear and to Modify the Order Dated 6/13/95" in Docket NO. 94-027, Cause No.

ACT/015/025-93B to be mailed certified mail, on the ____ day of October, 1995, to the following:

P 074 979 557

J. Craig Smith, Esq.
David B. Hartvigsen, Esq.
Nielsen & Senior
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

P 074 979 558
Jeffrey W. Appel, Esq.
Benjamin T. Wilson, Esq.
Collard, Appel & Warlaumont
1100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

P 074 979 559
Wendell Owen
Co-Op Mining Company
P.O. box 1245
Huntington, Utah 84528

P 074 979 560
Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

P 074 979 561
F. Mark Kingston, Esq.
341 South Main, Suite 406
Salt Lake City, Utah ~~84115~~ 84111

and hand-delivered the same date noted above to:

Thomas A. Mitchell, Esq.
Assistant Attorney General
Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center, Suite 475
Salt Lake City, Utah 84180

Toni Heldman

ATTACHMENT "D"

FILED

CLERK SUPREME COURT
UTAH

IN THE UTAH SUPREME COURT

Respondent .

Castle Valley Special Service District, North Emery Water Users Association and Huntington-Cleveland Irrigation Company, (collectively "Petitioners"), by and through counsel, hereby petition this Court for a Writ of Review directing Respondent Utah Board of Oil, Gas and Mining to certify its entire record, which

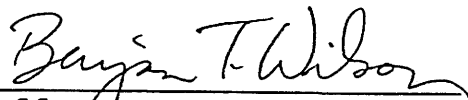
shall include all of the proceedings and evidence taken in this matter, to this Court for review.

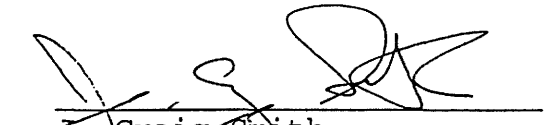
This petition specifically seeks review of the order dated June 13, 1995, reconsideration of which was subsequently denied in an Order dated October 12, 1995.

DATED this 9th day of November, 1995.

COLLARD, APPEL & WARLAUMONT

NIELSEN & SENIOR


Jeffrey W. Appel
Benjamin T. Wilson
Attorneys for Castle Valley
Special Service District


J. Craig Smith
David B. Hartvigsen
Attorneys for North Emery
Water Users Association
and Huntington-Cleveland
Irrigation Company

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 1995, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Joint Petition for Writ of Review, to the following:

Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

F. Mark Hansen, Esq.
341 South Main, Suite 406
Salt Lake City, Utah 84111

Jan Graham, Esq.
Utah Attorney General
236 State Street
Salt Lake City, Utah 84114

Thomas A. Mitchell, Esq.
Assistant Attorney General
3 Triad Center, #350
Salt Lake City, Utah 84180

Utah Board of Oil, Gas and Mining
3 Triad Center, #350
Salt Lake City, Utah 84180

Bryan T. Wilson

ATTACHMENT "E"

JEFFREY W. APPEL (3630)
MICHELE MATTSSON (5401)
APPEL & MATTSSON
175 South Main Street
Suite 1110
Salt Lake City, Utah 84111
Telephone: (801) 532-1252

Attorneys for Castle Valley
Special Service District

FILED

AUG 12 1993

SECRETARY, BOARD OF
OIL, GAS & MINING

IN AND BEFORE THE UTAH STATE DIVISION
OF OIL, GAS, AND MINING

COPY

In the Matter of the Tank Seam
Application of Co-Op Mining
Company, Bear Canyon Mine,
Emery County, Utah,
ACT/015/025

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Objection of Castle Valley
Special Service District
to Co-Op's Application to
Extend Mining into Tank
Seam

Castle Valley Special Service District ("Castle Valley"), by and through its counsel, Appel & Mattsson, hereby submits this Objection to Co-Op's Application to Extend Mining into the Tank Seam, located above the existing seam within the existing permit area of the Bear Canyon Mine (ACT/015/025).

The grounds for the Objection are as follows:

1. Castle Valley is a local government entity that provides culinary water to Huntington, Cleveland and Elmo, Utah. Castle Valley provides water for 1,050 connections (which includes at least 2650 persons) from springs located in the proximity of Co-Op's mining operations, including Big Bear Canyon Springs.

2. A major portion of Huntington City's culinary water supply

is diverted from Big Bear Canyon Springs, which is in the area of Co-Op's mining operations.

3. Castle Valley is concerned that Co-Op has not taken adequate measures to protect Castle Valley's water sources either in its present mining areas or in its proposed mining area within the Tank Seam. Castle Valley is particularly concerned about the continuing integrity of its water sources given Co-Op's past problems in this regard. The following are illustrations of Castle Valley's concerns:

a. Co-Op's past mining operations have contaminated Big Bear Canyon Springs and the aquifers feeding the springs.

b. Co-Op's past mining operations have adversely and permanently impacted the level of flow of Big Bear Canyon Springs. The flows have significantly diminished as a result of Co-Op's mining operations and have not recovered and/or recharged even after the most recent "wet" water year.

c. Over the years, Co-Op has been cited by the DOGM for failing to adequately protect the hydrologic resources in the proximity of its mining operations.

4. Castle Valley is concerned that Co-Op's proposed expansion of its mining operations into the Tank Seam will have an adverse impact upon Big Bear Canyon Springs and the aquifers feeding the springs.


5. Castle Valley believes Co-Op's proposed expansion may harm

the vested water rights of Castle Valley and water users whose points of diversion are located below Co-Op's proposed operations. These water sources including Big Bear Canyon Springs, represent critical and irreplaceable sources of water for several adjacent towns and communities.

WHEREFORE, Castle Valley, requests that Co-Op's Application to expand into the Tank Seam be rejected and that it be entitled to participate in a hearing on the matter.

Castle Valley further requests that it be kept apprised of all current or proposed Co-Op mining operations that may impact the quality and/or quantity of its water sources.

DATED this 12th day of August, 1993.



Jeffrey W. Appel
Michele Mattsson
Attorneys for Castle Valley

ATTACHMENT "F"

FILED

AUG 22 1994

SECRETARY, BOARD OF
OIL, GAS & MINING

David B. Hartvigsen (5390)
NIELSEN & SENIOR
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 532-1900

Attorneys for North Emery Water Users Association
and Huntington-Cleveland Irrigation Company

Jeffrey W. Appel (3630)
Michele Mattsson (5401)
APPEL & MATTSSON
9 Exchange Place
Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1252

Attorneys for Castle Valley
Special Service District

BEFORE THE BOARD OF OIL, GAS, AND MINING

DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE
REQUEST FOR AGENCY
ACTION BY PETITIONERS
NORTH EMERY WATER
USERS ASSOCIATION,
HUNTINGTON-CLEVELAND
IRRIGATION COMPANY, AND
CASTLE VALLEY SPECIAL
SERVICES DISTRICT

ACT/015/025

APPEAL OF DIVISION DETERMINATION
TO APPROVE SIGNIFICANT REVISION
TO PERMIT TO ALLOW MINING OF
TANK SEAM BY CO-OP MINING COMPANY

DOCKET NO. 94-027

CAUSE NO. ACT/015/025

North Emery Water Users Association ("NEWUA") and Huntington-Cleveland Irrigation Co. ("Huntington-Cleveland"), by and through their counsel, J. Craig Smith and David B. Hartvigsen of Nielsen & Senior and Castle Valley Special Service District ("Castle Valley"), by and through its counsel, Appel & Mattsson, respectfully submit this Request For Agency Action and Appeal of

Division determination to approve Co-Op Mining Company's ("Co-op") Significant Revision to extend its mining operations into the Tank Seam. This seam is located above the existing seam being mined and within the existing permit area of the Bear Canyon Mine (ACT/015/025).

NEWUA, Huntington-Cleveland and Castle Valley are collectively referred to herein as "Appellants/Petitioners".

LEGAL AUTHORITY & JURISDICTION OF THE BOARD

Appellants/Petitioners include a governmental entity and two non-profit corporations which provide the majority of domestic, municipal, irrigation and industrial water to Northern Emery County. They are appealing a Division determination to approve a Significant Revision of a Permit held by Co-op Mining Company to allow mining of the Tank Seam via the Bear Canyon Mine. Administrative review of a Division determination by this Board is provided under R645-300-200.

Persons with an interest which may be adversely affected may appeal a Division determination to this Board. Critical water sources of Appellants/Petitioners are found in the area of the Bear Canyon Mine. Castle Valley has developed and uses Big Bear Spring, and NEWUA has developed and uses Birch Spring. Both springs are in close proximity to the area being mined by Co-op. Huntington-Cleveland holds the water rights which are utilized by Castle Valley to serve Huntington City and by NEWUA to serve the domestic needs of unincorporated northern Emery County.

As water rights holders and water users of water sources in the immediate area of Co-op's mining, the Appellants/Petitioners are persons with an interest which may be adversely affected under R645-300-211 and R645-100-100. The Division determination to approve the significant revision was made on July 22, 1994, thus the appeal of a Division determination by persons with an interest which may be adversely affected is timely if filed on or before August 22, 1994 under R645-300-2.

RELIEF REQUESTED

Appellants/Petitioners respectfully request that this Board reverse the Division determination approving the Significant Revision, or in the alternative, Stipulations be added to the approval requiring Co-op to provide, at no expense, replacement water to Appellants/Petitioners to mitigate the adverse impacts of its mining activity on Big Bear Springs and Birch Spring, and require Co-op to implement adequate procedures to protect these water resources from contamination.

FACTS AND BASIS FOR RELIEF

1. Castle Valley is a local government entity that provides culinary water to the communities of Huntington, Cleveland and Elmo, Utah. Castle Valley provides water for approximately 1,050 connections (which includes at least 2,650 persons) from springs located in the proximity of Co-op's mining operations, including Big Bear Springs. A major portion of Huntington City's culinary water supply is diverted from Big Bear Springs, which is in the immediate area of the Bear Canyon Mine.

2. NEWUA is a mutual water company that provides culinary water to approximately 420 connections in the unincorporated portion of northern Emery County. It has developed Birch Spring which is also in the immediate vicinity of the Bear Canyon Mine, at a cost of approximately \$60,000.00 to provide culinary water to the homes it serves.

3. Huntington-Cleveland is a mutual water company that holds the water rights utilized by Castle Valley and NEWUA in Big Bear and Birch Springs.

4. Co-op has not taken adequate measures to protect Appellants/Petitioners' water sources either in its present mining areas or in its proposed mining area of the Tank Seam. Appellants/Petitioners are particularly concerned about the continuing integrity of their water sources given the material negative impacts on Big Bear and Birch Springs in the area of Co-op's mining operations which include the following:

a. Co-op's past mining operations have contaminated Big Bear Springs and Birch Spring and the aquifers feeding these springs.

b. Co-op's past mining operations have adversely and permanently impacted the level of flow of Big Bear and Birch Springs. The flows have significantly diminished as a result of Co-op's mining operations and have not recovered and/or recharged even after the "wet" water years.

c. Over the years, Co-op has been cited by the Division of Oil, Gas & Mining ("DOGM") for failing to adequately

protect the hydrologic resources in the proximity of its mining operations.

d. As recently as February of this year, Co-op was assessed penalties by DOGM for failing to take adequate precautions to protect hydraulic resources at its Big Bear Mining operations.

5. Co-op's proposed expansion of its mining operations into the Tank Seam will continue and increase the adverse impact upon Big Bear and Birch Springs and the aquifers feeding the springs.

6. Appellants/Petitioners believe Co-op's proposed expansion will continue to harm to their vested water rights and sources. Big Bear and Birch Springs represent critical and irreplaceable sources of water for Huntington City, Elmo Town and Cleveland Town and adjacent unincorporated Emery County.

7. Evidence of surface subsidence along the faults from which Big Bear and Birch Springs emanate demonstrates that Co-op's mining is impacting those faults.

8. According to Co-op's own records, it is currently encountering 500 gallons per minute in the Bear Canyon Mine, and it is diverting 200 gallons to uses within the mine and 300 gallons per minute out of the mine and away from its natural course.

9. There is no indication that Co-op has made the necessary filings with the State Division of Water Rights or has received the necessary approvals from the Division for use of this water in the mine or elsewhere.

10. It is apparent from the high quantity of ground water being diverted (now reported at a rate of 500 gpm) from the Co-op Mine, the mine has intersected dynamic ground water that has been naturally existing in the regional Blackhawk-Star Point aquifer which supplies the Big Bear and Birch Springs.

11. The fact that groundwater interception and flow has increased as Co-op Mining has extended their workings farther north, shows that they are penetrating the regional Blackhawk-Star Point aquifer deeper, where there is a higher head with increased flow.

12. As further data is collected on the hydrology and geology of the area, it becomes more obvious from the reporting geologists of the U.S. Geological Survey in three separate studies of the region, that the Blackhawk Formation is a part of the regional, large storage aquifer which includes the sandstone members of the Star Point Sandstone. The United States Geological Survey ("USGS") reports are:

Danielson, T.W., and others, 1981, Hydrology of the Coal-Resources Area in the Upper Drainages of Huntington and Cottonwood Creeks, Central Utah: U.S. Geological Survey, Open-File Report 81-539, prepared in cooperation with the Utah Department of Natural Resources and Energy, Division of Oil, Gas and Mining;

Lines, G.C., 1985, The Ground-Water System and Possible Effects of Underground Coal Mining in the Trial Mountain Area, Central Utah: U.S. Geological Survey Water-Supply Paper 2259; and

Waddell, K.M., and others, 1986, Hydrology of the Price River Basin, Utah with Emphasis on Selected Coal-Field Areas: U.S. Geological Survey Water-Supply Paper 2246.

13. The Probable Hydrologic Consequence ("PHC") prepared by Co-op's consultants, upon which the Division relied in approving the Significant Revision, discounts all of the USGS studies and reports done on the expanded region in regards to their identifying the regional aquifer to be comprised of both the Blackhawk and Star Point formations.

14. The PHC and the Cumulative Hydrologic Impact Assessment ("CHIA") both fail to recognize the adverse impact of Co-op's mining and specifically mine dewatering activity on regional aquifers that feed the Big Bear and Birch Springs, and thus the CHIA fails to meet the minimum requirements of R645-301-729.100 in not recognizing or mitigating the material damage to hydrologic balance outside of the permit area.

15. The approval of the Significant Revision also violates R645-301-731 and its subsections in failing to recognize and require steps to minimize disturbance to the hydrologic balance.

16. The approval of the Significant Revision also violates lease stipulations of the United States Bureau of Land Management which is the federal agency which manages the lands and subject minerals leased to Co-op.

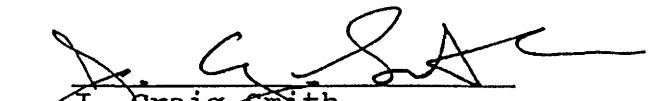
17. The approval of the Significant Revision fails to require Co-op to obtain the necessary approvals or otherwise abide by the requirements of State agencies including, but not limited to, the Division of Water Rights and Department of Environmental Health.

For the reasons and grounds set forth herein, and in previous Memoranda and oral argument on the subject, Appellants/Petitioners

respectfully request that they be given an opportunity for a hearing where they can each present oral argument and demonstrate the material damage which will result to their water sources if the Division's approval of the Significant Revision is not reversed or altered.

DATED this 22nd day of August, 1994.

NIELSEN & SENIOR


J. Craig Smith
David B. Hartvigsen

APPEL & MATTSSON

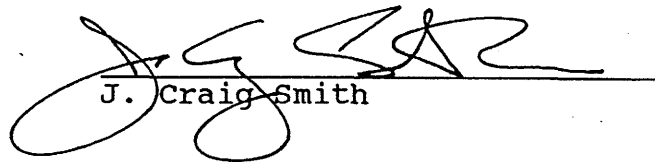

Jeffrey W. Appel
Michele Mattsson

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing instrument upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid, to:

Mr. Wendell Owen
Co-op Mining Company
P. O. Box 1245
Huntington, Utah 84528

Dated at Salt Lake City, Utah, this 22nd day of August, 1994.


J. Craig Smith

ATTACHMENT "G"

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

OCT -7 -94

---oo0oo---

IN THE MATTER OF THE REQUEST	:	
FOR AGENCY ACTION AND APPEAL	:	AMENDED
OF DIVISION DETERMINATION TO	:	NOTICE OF HEARING
APPROVE SIGNIFICANT REVISION TO	:	
PERMIT TO ALLOW MINING OF TANK	:	
SEAM BY CO-OP MINING COMPANY	:	
BY PETITIONERS NORTH EMERY	:	
WATER USERS ASSOCIATION,	:	DOCKET NO. 94-027
HUNTINGTON-CLEVELAND	:	
IRRIGATION COMPANY, AND	:	CAUSE NO. ACT/015/025
CASTLE VALLEY SPECIAL SERVICES	:	
DISTRICT, CARBON COUNTY, UTAH	:	

---oo0oo---

THE STATE OF UTAH TO ALL PERSONS INTERESTED IN THE ABOVE
ENTITLED MATTER.

Notice is hereby given that the Board of Oil, Gas and Mining ("Board"), State of Utah, will conduct a hearing on Tuesday, October 25, 1994, at 9:00 a.m., or as soon thereafter as possible, in the Boardroom of the Division of Oil, Gas and Mining, 355 West North Temple, 3 Triad Center, Suite 520, Salt Lake City, Utah.

The hearing will be conducted in accordance with the Utah Code Ann. § 40-10-1 et seq., Utah Code Ann. § 63-46b-1 et seq. (1953, as amended), and the Procedural Rules of the Board.

The purpose of the proceeding will be for the Board to consider the objection of the petitioner to the Division determination approving Co-Op Mining Company's Significant Revision to extend its mining operations into the Tank Seam. This seam is located above the existing seam being mined and within the existing permit area of the Bear Canyon Mine.

Natural persons may appear and represent themselves before the Board. All other representation by parties before the Board will be by attorneys licensed to practice law in the state of Utah, or attorneys licensed to practice law in another jurisdiction which meet the rules of the Utah State Bar for practicing law before the

Utah Courts. Attorney representation may be waived by the Board upon petition and good cause shown.

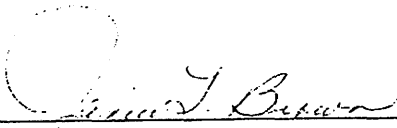
Objections to this matter should be filed with the Secretary of the Board at the above address no later than the 10th day of the month, or two weeks before the scheduled hearing, whichever is earlier. Objections filed later than the 10th day may be considered by the Board at or before the regularly scheduled meeting for good cause shown.

Persons interested in this matter may participate pursuant to the procedural rules of the Board. The Request for Agency Action, and any subsequent pleadings, may be inspected in the office of the undersigned.

Pursuant to the Americans with Disabilities Act, persons requiring auxiliary communicative aids and services to enable them to participate in this hearing should call Janice Brown at 538-5340, at least three working days prior to the hearing date.

DATED this 6th day of October 1994.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING
Dave D. Lauriski, Chairman



/s/ Janice L. Brown
Secretary of the Board
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
(801) 538-5340

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing AMENDED NOTICE OF HEARING for Docket No. 94-027, Cause No. ACT/015/025 to be mailed by certified mail, postage prepaid, on the 6th day of October 1994, to the following:

J. Craig Smith, Esq.
David B. Hartvigsen, Esq.
Nielsen & Senior
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Jeffrey W. Appel, Esq.
Michele Mattsson, Esq.
Appel & Mattsson
9 Exchange Place, Suite 1100
Salt Lake City, Utah 84111

Wendell Owen
Co-Op Mining Company
P.O. Box 1245
Huntington, Utah 84528

Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

F. Mark Hansen, Esq.
341 South Main, Suite 406
Salt Lake City, Utah 84111

